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82-224 No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3486,
Petitioner,

v.

NEW JERSEY AIR NATIONAL GUARD, 177th FIGHTER INTERCEPTOR GROUP and DEPARTMENT OF DEFENSE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether a labor organization representing National Guard Technicians pursuant to the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 *et seq.*) may negotiate the inclusion of grievance, and adverse action procedures culminating in binding arbitration within a collective bargaining agreement with the New Jersey Air National Guard regardless of any provisions in the National Guard Technician Act (32 U.S.C. § 709).*

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* All the parties in the United States Court of Appeals for the Third Circuit are listed in the caption with the exception of the Federal Labor Relations Authority (FLRA). The FLRA is an administrative agency of the federal government, the decision of which is the subject of this action. Petitioner intervened on behalf of the FLRA before the Court of Appeals. The Adjutants General Association and the Commonwealth of Pennsylvania, Pennsylvania National Guard were allowed to participate as amici before the Court of Appeals.

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No.

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AFL-CIO, LOCAL 3486,
Petitioner,

v.

NEW JERSEY AIR NATIONAL GUARD,
177th FIGHTER INTERCEPTOR GROUP and
DEPARTMENT OF DEFENSE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PRELIMINARY STATEMENT

Petitioner American Federation of Government Employees, AFL-CIO, Local 3483 prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in *New Jersey Air National Guard, 177th Fighter Interceptor Group and Department of Defense v. Federal Labor Relations Authority*, 677 F.2d 276 (3rd Cir. 1982) on April 21, 1981, and that court's denial, on May 11, 1982, of petitioner's request for rehearing *en banc*.

OPINIONS BELOW

The decision and order of the Federal Labor Relations Authority, No. O-NG-119, is reported at 5 FLRA No. 26 (February 20, 1981).[1] The opinion of the Court of Appeals for the Third Circuit is reported at 677 F.2d 276 (3rd Cir. 1982).[2] Judgment was entered April 12, 1982.[3] Intervenor filed a timely motion for reconsideration and reconsideration *en banc* which was denied by the Court of Appeals on May 11, 1982.[4]

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on April 12, 1982. A timely petition for rehearing *en banc* was denied May 11, 1982, and the petition for certiorari has been filed within 90 days of the denial of reconsideration.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), which is styled the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.* (hereinafter "Statute")[5] and the National Guard Technicians Act of 1968, Pub. L. No. 90-486, 82 Stat. 755 (1968), 32 U.S.C. § 709 (hereinafter "Technician Act").[6]

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[1] Appendix A at 1a-8a (hereinafter "Pet. App." followed by the appropriate letter and page number(s)).

[2] Pet. App. B at 9a-30a.

[3] Pet. App. C at 31a-32a.

[4] Pet. App. D at 33a-34a.

[5] Pet. App. E at 35a-87a.

[6] Pet. App. F at 88a-90a.

STATEMENT OF THE CASE

Petitioner, American Federation of Government Employees, AFL-CIO, Local 3486 (hereinafter Union) is a labor union representing National Guard technicians in the New Jersey Air National Guard (hereinafter "Guard" or "management").

During the course of negotiating a collective bargaining agreement, the Guard refused to bargain on several union contract proposals concerning conditions of employment of National Guard technicians: reduction-in-force,[7] grievance of employees, and adverse disciplinary actions against technicians by the Guard.[8]

The Federal Labor Relations Authority (hereinafter FLRA) is an agency of the federal government created by Congress,[9] a duty of which is to decide questions concerning the negotiability of contract provisions[10] offered in collective bargaining in the federal sector.

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[7] The reduction-in-force proposal is not at issue in this Petition.

[8] The union proposals at issue read, in full:

Grievance Procedure

Section 4. An aggrieved employee affected by discrimination, removal, reduction in grade or pay based on an unacceptable performance or any other adverse action may raise the matter under any statutory appellant [sic] procedure or *with the concurrence of the union* under the negotiated procedure but not both; *except for a discrimination complaint which may be a mixed procedure and filed under both processes.*

Section 4(b). The parties agree that the grievance procedure negotiated herein (Article XI) may be used to adjudicate any misunderstanding or disagreement relating to "just cause" and what is considered "fair and equitable."

The italicized portions were held by the FLRA to be non-negotiable and are not at issue in this petition.

[9] 5 U.S.C. § 7104. Pet. App. E at 45a-46a.

[10] 5 U.S.C. § 7105. Pet. App. E at 46a-50a.

The question of negotiability of the union proposals was submitted to the FLRA pursuant to 5 U.S.C. § 7117(c).

The FLRA [11] ruled in favor of the union and ordered the Guard to engage in collective bargaining over the disputed proposals.

The Guard petitioned the U.S. Court of Appeals for review of the FLRA decision pursuant to jurisdiction granted the Court by 5 U.S.C. § 7123(a). The FLRA filed a cross-petition for enforcement via 5 U.S.C. § 7123 (b). American Federation of Government Employees, AFL-CIO, Local 3486, was permitted to join as an intervenor in the action before the Court of Appeals.

The court held [12] that the National Guard Technician Act of 1968, 32 U.S.C. § 709, rather than the Labor-Management Relations Chapter of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-7135 governed the case at bar. The court granted the Guard's petition for review, set aside the decision of the FLRA and denied the FLRA's cross-petition for enforcement.[13] Judgment issued April 12, 1982.[14]

Intervenor filed a timely motion for reconsideration and motion for reconsideration *en banc* which was denied by the court on May 11, 1982.[15]

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[11] *American Federation of Government Employees, AFL-CIO, Local 3486 and New Jersey Air National Guard, 177th Fighter Interceptor Group*, 5 FLRA No. 26 (1981) (Hereinafter *AFGE v. NJ Air Guard*), Pet-App. A. at 7a-8a.

[12] *New Jersey Air National Guard, 177th Fighter Interceptor Group and Department of Defense v. Federal Labor Relations Authority*, 677 F.2d 276 (3rd Cir. 1982) (hereinafter *NJ Air National Guard*). Pet. App. B at 9a-30a.

[13] *Id.* at 286. Pet. App. B at 30a.

[14] Pet. App. C at 31a-32a.

[15] Pet. App. D at 33a-34a.

REASONS FOR GRANTING PETITION

In establishing a system of labor-management relations for the federal service, Congress intended to provide a means for labor and management to bargain collectively over conditions affecting employment.[16]

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[16] Section 3 of the Civil Service Reform Act, *Findings and Statement of Purpose*, provided that certain rights of federal employees should be expressly recognized by statute. In relevant part Section 3 states:

> It is the policy of the United States that—
>
> . . . (10) the right of Federal employees to organize, bargain collectively, and participate through labor organizations in decisions which affect them, with full regard for the public interest and the effective conduct of public business, should be specifically recognized in statute.

5 U.S.C.A. § 1101 note.

This basic purpose of the statute and the underlying findings are set forth in Section 7101:

> The Congress finds that—
>
> (1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—
>
> (A) safeguards the public interest,
>
> (B) contributes to the effective conduct of public business, and
>
> (C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and
>
> (2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.
>
> Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

Section 7101(a) Pet. App. E at 36a-37a.

The purpose of the statute is "to *prescribe certain rights* and obligations *of the employees of the Federal Government* and to establish procedures which are designed to meet the special re-

The FLRA is the federal agency created by Congress to enforce the terms of the Civil Service Reform Act.[17]

National Guard technicians are civilians, numbering approximately 42,000[18], who perform a wide range of administrative, clerical, educational and technical tasks as federal employees pursuant to 32 U.S.C. § 709.[19]

> The National Guard Technician Act of 1968 was a congressional response to problems stemming from the ambiguous employment status of full time civilian technicians who served in National Guard units throughout the country. They performed such essential and varied services as maintenance of equipment and facilities, training, support of aircraft operations, and clerical functions. Although these technicians, formerly called caretakers and clerks, had been paid by the Federal government, most were required to hold concurrent National Guard membership as a condition of employment, and were considered State employees.
>
> Before the Act's passage, no uniform national program for the retirement and fringe benefits had been established. Moreover, the uncertain legal status of the technicians led to conflicting court decisions in third party action claims against the government. The Technicians Act gave the civilians Federal employee status. To clarify supervisory functions, Adjutant Generals [sic], although State officers, were

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quirements and needs of the Government." Section 7101(b), [Emphasis supplied] Pet. App. E at 37a.

Fundamental to the specified employee rights is the right "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees. . . ." Section 7102(2), Pet. App. E at 38a.

[17] 5 U.S.C. §§ 7105, 7117. Pet. App. E at 46a-50a, 65a-69a.

[18] S. Rep. No. 1448, 90th Cong., 2d Sess. 2 (1968).

[19] 32 U.S.C. § 709. Pet. App. F at 88a-90a.

> made responsible for the technicians employment and termination of service. [Emphasis added] [20]

The FLRA's administration decision in this case [21] argues persuasively and correctly, that 5 U.S.C. § 7121 [22] and 32 U.S.C. § 709(e) [23] can coexist.

The FLRA correctly relies upon 5 U.S.C. § 7121(e)(1) [24] which acknowledges the preexistence of statutory and regulatory appeal systems throughout the varied federal sector. 5 U.S.C. § 7121 grants the employee the option of using the various agencies' appeal procedures (be they statutorily created or regulatory) or the negotiated grievance procedure.

The FLRA cites the guidance set forth in the legislative history of 5 U.S.C. § 7121(e):

> Subsection (e) provides employees with an option, in appealing matters covered under 5 U.S.C. Section 4303 (demotion or removal for unacceptable performance) or 5 U.S.C. Section 7512 (removal, suspension for more than 30 days, reduction-in-grade, reduction in pay of an amount exceeding one step of an employee's grade or 3 percent of the employee's base pay, furlough of thirty days or less), or using the statutory appeal procedure if such matters have been negotiated into the coverage under the grievance procedure. It also provides that matters similar to

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[20] *DiLuigi v. Kafkalis*, 584 F.2d 22 at 24 (3rd Cir. 1978).

[21] *AFGE v. NJ Air Guard*, supra note 11, at p. 4, Pet. App. A at 4a-6a. Citing as controlling *National Association of Government Employees R12-132 and California National Guard*, 5 FLRA No. 25 (1981) at pp. 3-7 (hereinafter *NAGE* R12-132). Pet. App. G at 94a-100a.

[22] Pet. App. E at 77a-80a.

[23] Pet. App. E at 83a-89a.

[24] Pet. App. E at 79a-80a.

those listed above which may arise under other personnel systems applicable to employees covered by this subchapter, such as those provided in Title 38, United States Code, may, in the discretion of the aggrieved employee, be raised under either the negotiated grievance procedure or under any appellate procedures which would otherwise be available to the employee if the matter weren't covered by the grievance procedure. S. Rep. No. 95-969, 95th Cong., 2d Sess. 110 (1978) *reprinted in* [1978] U.S. Code *Congressional Administrative News*, 2723, 2832.[36]

The Senate Report is illuminating in its use of Title 38 (Veterans Administration) as an example of an in-place procedure for discipline or removal of federal employees. 38 U.S.C. § 4110(d)[37] provides that the decision of the Veterans Administration Medical Director ". . . shall be final. . . ." The Senate Report acknowledges the existence of statutes that grant ultimate, nonreviewable discretion in disciplinary and other matters in an agency official. The Senate Report, however, specifically states that the nonreviewable discretion of an agency official, though specifically authorized by statute, is no bar to the use of the negotiated grievance procedure authorized by 5 U.S.C. § 7121(e).

The FLRA correctly rejected the Guard's contention that negotiated grievance procedures ending in binding arbitration would violate the provisions of 32 U.S.C. § 709(e)(5) and correctly stated that 5 U.S.C. § 7121 provides for an *alternative* procedure for grievances.[37]

The Court of Appeals found that National Guard technicians are within the coverage of the Civil Service Re-

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[36] *NAGE R12-122*, supra note 21, at p. 6. Pet. App. G at 98a-99a.

[37] 38 U.S.C. § 4110. Pet. App. H at 102a.

[37] *NAGE, R12-122*, supra note 21, at 6-7. Pet. App. G at 100a.

form Act.[29] It concluded, however, that § 709(e) of the National Guard Technician Act of 1968,[30] by committing the matters contained in the union proposals at issue herein "to the administratively unreviewable discretion of the Adjutant General commanding each state National Guard unit"[30] precluded bargaining on such proposals. The court determined that it could not apply the applicable provisions of the Labor-Management Act to National Guard Technicians without, in the court's opinion, effectively repealing § 709(e) of the National Guard Technician Act. The court held, after an analysis of the legislative history of the Technician Act and from the absence of any specific reference to either the Technician Act or technicians in the legislative history of the Labor-Management Act, that "Congress intended the Technician Act, rather than the Labor-Management Act, to govern in this situation."[31] The court held that "the requirements of § 7121 of the Labor-Management Act do not override the provisions of Section 709(e) of the Technician Act."[32]

The court rejected the FLRA's contention that 5 U.S.C. § 7121(e)(1) allows the establishment of alternative procedures for adverse action appeals.

> This outcome, however, rests upon a premise with which we cannot agree: that the Technician Act merely creates a *procedure* for handling grievances. Nothing in section 709(e) sets out vehicles or guidelines by which grievances can be resolved, or creates

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[29] "The Act makes no reference whatsoever to the National Guard or National Guard technicians and *the technicians therefor fall within the implicit coverage of the act.*" [Emphasis added] *NJ Air National Guard, supra* note 12, at p. 281. Pet. App. B at 19a.

[30] 32 U.S.C. § 709(e). Pet. App. F at 88a-89a.

[30] *NJ Air National Guard, supra* note 12, at p. 277. Pet. App. B at 11a.

[31] Ibid. at pp. 277-78. Pet. App. B at 11a.

[32] Ibid, p. 286. Pet. App. B at 29a.

anything that could fairly be termed a "statutory procedure" within the meaning of the Labor-Management Act. Instead, and quite plainly, section 709(e) imposes a *limit* on procedures: it establishes only that a dispute over one of the enumerated matters, whatever procedural route it may take, must terminate, finally, with the decision of the adjutant general. The "accommodation" posited by the FLRA—a negotiated procedure, which may reject the adjutant general's final decision, as an alternative to a statute limiting grievance procedures to that final decision—therefore, is no accommodation at all; rather, it is a negation of the Technician Act.[23]

Even if the Court of Appeals is correct in stating that § 709(e) of the Technician Act does not create a statutory appeal procedure, this fact is not determinative of the applicability of 5 U.S.C. § 7121(e) to technicians or the Technician Act. In this connection, 5 U.S.C. § 7121(e) refers to matters arising under other personnel systems applicable to employees covered by the Labor-Management Act, rather than of matters subject to another statutory appeal procedure. 5 U.S.C. § 7121(e)[24] states that employees subject to other personnel systems have the option of raising these matters by utilizing the negotiated grievance-arbitration procedures or "the appellate procedures, *if any*, applicable to those matters."

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[23] Ibid., at p. 282. Pet. B at 21a-22a.

[24] 5 U.S.C. § 7121

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage

* * * * *

(e)(1) Matters covered under sections 4303 and 7512 of this title which all fall within the coverage of the negotiated griev-

The Court of Appeals, through its interpretation of the National Guard Technician Act (32 U.S.C. § 709(e)) [28] eviscerates the later enacted 5 U.S.C. § 7121(e).

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ance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, *if any*, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first. (Emphasis added.) 5 U.S.C. § 7121. Pet. App. E at 79a-80a.

[28] 32 USC § 709. Technicians: employment, use, status

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment.

32 U.S.C. § 709 set out in full Pet. App. F at 88a-89a.

The FLRA's decision in this case should have been granted deference by the Court of Appeals pursuant to 5 U.S.C. § 7123 and 5 U.S.C. § 706.

By not according the administrative decision of the FLRA due deference in this case, the Court of Appeals invites balkanization of federal sector labor relations. This result is in direct contravention of the Congressional mandate found in 5 U.S.C. § 7105(a) for a single authoritative voice in collective bargaining in the federal government; that voice being the FLRA.

The Court of Appeals justifies its lack of deference to the FLRA decision by asserting that the FLRA's decision rests not upon the interpretation of the Labor-Management Act but rather the FLRA's attempted interpretation of an Act outside its competence, the National Guard Technicians Act, 5 U.S.C. § 709.[26]

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[26] The FLRA asserts that because it was charged by Congress with the responsibility of construing and implementing the Labor-Management Act, we must defer to its interpretation of that Act "'unless there are compelling indications that it is wrong.'" *Department of Defense, Army-Air Force Exch. Serv. v. Federal Labor Relations Auth.*, 659 F.2d 1140, 1161-62 (D.C. Cir. 1981); (*quoting Miller v. Youakim*, 440 U.S. 125, 145 n.25, 99 S.Ct. 957, 969 n.25, 59 L.Ed.2d 194 (1979)). In this case, however, we are not faced only with a question of construing the Labor-Management Act. Rather, we must resolve an apparent conflict between that Act and the Technician Act. While we place considerable weight on the interpretation of the Labor-Management Act rendered by the FLRA, we are not obliged to defer to the FLRA's reading of the Technician Act, or to its resolution of the conflict between the two statutes. *Cf. Teosie v. Califano*, 651 F.2d 719, 722 (10th Cir. 1981) (Secretary of Health, Education and Welfare's construction of agency regulations "is not entitled to special deference to the extent that it rests on the interpretation of another agency's statutes and regulations").

NJ Air Guard, *supra* note 12 p. 281 n.6; Pet. App. B at 20a.

This decision by the Court of Appeals not to grant deference to the FLRA in a decision concerning negotiability on contract proposals is contrary to the decisions of other courts which have considered like questions.

The District of Columbia Circuit in deciding one of the first cases under the new Statute ruled that great deference should be given to the decisions of the FLRA on questions of negotiability.

> "Under the circumstances presented by this case, we believe that the FLRA's decision concerning Proposals [regarding issues of negotiability] must be upheld. We begin with the recognition that courts must yield great deference to an interpretation of a statute by the agency entrusted with its administration. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *United States v. City of Chicago*, 400 U.S. 8, 10 (1970); *Udall v. Tallman*, 380 U.S. 1, 4 (1965). "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Development Co. v. Int'l Union of Elec., Radio & Machine Wkrs*, 367 U.S. 396, 408 (1961), quoting *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933), in turn quoted in *Nat'l Federation of Federal Employees v. FLRA*, *supra*, [652] F.2d at [198], slip opinion at 3-4, and in *Udall v. Tallman*, *supra*, 380 U.S. at 16. The surface ambiguity of the central statutory distinction provides a further reason for us to defer to the considered judgment of the Authority. As we explained above, the task of distinguishing negotiable procedures from management's reserved substantive authority involves questions of judgment and balance, about which reasonable people could easily differ. *And Congress intended the needed judgments to be made, not by this court, but by the Au-*

thority. "To sustain the Commission's application of [a] statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153 (1946), quoted in *Udall v. Tallman*, *supra*, 380 U.S. at 16. As the Supreme Court has stated repeatedly, "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Miller v. Youakim*, 440 U.S. 125, 145 n.25 (1979), quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969) (footnote omitted); see *Board of Gov. of Federal Reserve System v. First Lincolnwood Corp.*, 439 U.S. 234, 251 (1978); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965). (Emphasis added.) [27]

If the Court grants certiorari and determines the merits of the Court of Appeals' decision overturning the FLRA's administrative decision, the Court would have the opportunity to provide crucial guidance on the interpretation of the new Labor-Management Statute. The Court would also have the opportunity to definitively decide the authority of the FLRA to interpret the Labor-Management Relations Act, specifically instances when the Act interrelates with other statutes. Finally, the Court would provide crucial guidance on the right of 42,000 National Guard technicians to collectively bargain the conditions of their employment as intended by Congress.

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[27] *Dept. of Defense, Army-Air Force Exchange Service v. Federal Labor Relations Authority*, 659 F.2d 1140, 1161-62 (D.C. Cir. 1981). Cf. *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 672 F.2d 732 (9th Cir. 1982) (FLRA unfair labor practice finding); *Internal Revenue Service v. Federal Labor Relations Authority*, 671 F.2d 560 (D.C. Cir. 1982) (FLRA unfair labor practice finding).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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